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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FRED M. CHARNESS et al., Plaintiffs and Appellants, v. GARY RAND et al., Defendants and Respondents.	B202056 (Los Angeles County Super. Ct. No. BC300076)

APPEAL from an order of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Law Offices of Fred M. Charness and Dennis E. Braun; Evan D. Marshall for Plaintiffs and Appellants.

Gary Rand & Suzanne E. Rand-Lewis and Suzanne E. Rand-Lewis for Defendants and Respondents.

Some four years after filing a malicious prosecution action against an individual and her attorneys, the plaintiffs brought a motion to disqualify the attorney defendants from representing the individual defendant in the joint defense of the action. The trial court continued the hearing on the motion to disqualify in order to enable the defendant attorneys to obtain a declaration from the individual defendant indicating that she was aware of any potential conflict and waived it. The declaration was provided, and the trial court denied the motion. The plaintiffs appeal; we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On March 4, 2000, Gloria Gallegos rented a truck or trailer from a local U-Haul contractor. She was involved in an accident in which she caused $3,302.40 damages to a carport. U-Haul provides a small amount of excess insurance for its customers, through Republic Western Insurance Company ("Republic"). Republic paid the claim, and sought reimbursement from Gallegos's own automobile liability insurer. When Gallegos's insurer denied coverage, Republic forwarded the file to its attorney,

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[1] This is the *fourth* appeal in the *third* litigation arising out of what was a $3,300 insurance claim. In an opinion written more than three years ago, we expressed our view that neither side was blameless and exhorted the parties "to resolve their dispute without further unnecessary expenditure of judicial, and their own, resources." Obviously, our advice has not been heeded. Let us be perfectly clear. This case involves two sets of lawyers who are committed to the financial and professional destruction of each other, and one client caught in the middle. While we are concerned by the continued use of judicial resources in a matter that is fueled by little more than spite, we would have little dispute with the parties' apparent determination to stop at nothing short of mutually assured destruction if they did not continue to involve a client whom they all agree is blameless.

Fred Charness ("Attorney Fred Charness").[2] On March 28, 2001, Attorney Fred Charness filed the subrogation action on behalf of Republic. The subrogation action, however, was brought against Gallegos herself, not her insurance company. Clearly, this was improper. No legal basis exists for an insurer to bring a subrogation action against its own insured. We stress this fact because the Attorneys Charness would eventually take the position that they are the wronged parties in this ongoing dispute. Yet none of the subsequent litigation would have occurred if Attorney Fred Charness had not improperly filed a subrogation action against his client's own insured.

Gallegos was represented by Attorney Suzanne Rand-Lewis ("Attorney Rand-Lewis").[3] Attorney Rand-Lewis wrote Attorney Fred Charness, requesting him to dismiss the subrogation action. Her letter stated, in pertinent part: "If you do not agree to dismiss the action, Defendant intends to file a Cross-Complaint for breach of contract, bad faith, fraud, violation of [Business and Professions Code s]ection 17200, etc." The parties dispute what happened next. Attorney Fred Charness believed he had an agreement with Attorney Rand-Lewis to dismiss the subrogation action with prejudice in exchange for a waiver of costs and an agreement that the threatened action would not be filed. He sent Attorney Rand-Lewis a request for dismissal with a cover

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[2] Attorney Fred Charness's daughter, Leigh Charness, is also an attorney. She will be referred to as "Attorney Leigh Charness." Together, we refer to them (and any related professional entities) as "Attorneys Charness."

[3] In fact, Gallegos was represented by some combination of Attorney Rand-Lewis, Attorney Gary Rand, and their related professional entities. We refer to them collectively as "Attorneys Rand."

letter setting forth his understanding of the agreement. Attorney Rand-Lewis either rejected or repudiated the agreement (depending on whether there had been such an agreement), stating that the dismissal was never to be conditional and demanding that the subrogation action be dismissed unconditionally.

That same day, Gallegos filed suit against Republic, U-Haul and the Attorneys Charness ("the insured's action"). The complaint alleged six causes of action; each cause of action was alleged against all defendants. As against the Attorneys Charness, Gallegos alleged that the subrogation action was baseless, and that Attorney Fred Charness had agreed to unconditionally dismiss it, but had failed to do so. Gallegos alleged that this conduct rendered the Attorneys Charness liable for: (1) breach of contract/bad faith; (2) fraud; (3) negligent misrepresentation and concealment; (4) unfair business practices in violation of Business and Professions Code section 17200; (5) national origin discrimination in violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.); and (6) intentional infliction of emotional distress.

It was clear from the filing of this action that there was no agreement for Attorney Rand-Lewis to not further prosecute Republic and the Attorneys Charness in exchange for the dismissal of the subrogation action. Nonetheless, perhaps in an acknowledgement that the subrogation action never should have been filed against Gallegos, Attorney Fred Charness filed a request for dismissal of that action. After the subrogation action had been dismissed, Gallegos did not dismiss the insured's action. Instead, she amended her complaint to add a cause of action for malicious prosecution of the subrogation action.

Gallegos settled her dispute with Republic and U-Haul, and dismissed her action against them for a payment of $30,000.[4] The Attorneys Charness demurred to the complaint; their demurrer was sustained without leave to amend the first six causes of action, but Gallegos was permitted to proceed with her malicious prosecution cause of action.

The Attorneys Charness then filed a special motion to strike the remaining malicious prosecution cause of action under Code of Civil Procedure section 425.16, the anti-SLAPP statute. Attorney Rand-Lewis responded by filing a request for dismissal of the insured's action. The Attorneys Charness sought their attorney's fees in connection with the anti-SLAPP motion, on the theory that the action had been dismissed *because of* the anti-SLAPP motion.

In opposition to the request for attorney's fees, a declaration was submitted from, among others, Gallegos. Gallegos's declaration stated that, at a mediation in the case, Attorney Leigh Charness "shocked and scared" her, and made her cry. Attorney Leigh Charness filed a declaration stating that this did not occur, and that she had said nothing to Gallegos at the mediation. Whether Gallegos had actually signed her declaration ("the Gallegos declaration") would later become a matter of dispute.

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[4] We are greatly simplifying the facts. In an earlier appeal, Gallegos and the Attorneys Rand took the position that the settlement was to result in a dismissal of the insured's action against the Attorneys Charness, as well as against Republic and U-Haul. While we did not resolve the issue in that appeal, the facts weighed heavily against that interpretation.

The trial court awarded the Attorneys Charness $11,750 in attorney's fees, concluding that: (1) the voluntary dismissal had been filed in response to the anti-SLAPP motion; and (2) the anti-SLAPP motion would have been successful. On March 13, 2003, Gallegos filed a timely notice of appeal of the attorney's fees order ("the first appeal"). The first appeal would not be resolved until May 13, 2005.

In February 2003, before the notice of appeal was filed, the Attorneys Charness made a complaint against the Attorneys Rand to the State Bar. Several years later, this would result in charges being filed against the Attorneys Rand.

On July 31, 2003, the Attorneys Charness filed a malicious prosecution against Gallegos and the Attorneys Rand ("the Charness action"). They alleged that the insured's action was maliciously prosecuted against them. They did not assert that the malicious prosecution cause of action in that suit was brought without probable cause; they alleged only that the other six causes of action were. The Attorneys Rand represent themselves and Gallegos in their defense of the Charness action.[5]

As might be expected, Gallegos and the Attorneys Rand responded to the Charness action with their own anti-SLAPP motion. The Attorneys Charness were permitted to depose Gallegos in order to oppose the anti-SLAPP motion. The deposition was held on August 6, 2004. At her deposition, Gallegos gave some testimony which ultimately led the Attorneys Charness to question whether the Attorneys Rand had pursued the insured's action without the knowledge and/or full

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[5] The Attorneys Charness were, and are, represented by counsel.

consent of Gallegos. When asked if she had immediately wanted to sue the Attorneys Charness after the subrogation action had been dismissed, she responded, "No." However, Gallegos also testified that the insured's action was filed with her approval and that the allegations in the complaint were true. When asked about the Gallegos declaration, Gallegos responded, "I have seen this, but I didn't sign it." Prior to signing her deposition, however, Gallegos changed this testimony to read, "I did not have time to come in to my lawyers[']' office to sign it so after reviewing it I authorized my lawyers[']' office to sign it on my behalf . . . ."

The anti-SLAPP motion was ultimately heard on September 8, 2004. The trial court denied it on procedural grounds, concluding that it had been untimely set for a hearing. Gallegos and the Attorneys Rand filed a notice of appeal ("the second appeal").

While both appeals were pending, the parties made certain settlement offers, both in and out of mediation. While parsing the precise terms of the settlement offers is outside the scope of this appeal, the record discloses that many of the settlement offers made by the Attorneys Charness were global settlement offers pertaining to all outstanding disputes in both pending cases. On May 11, 2005, the Attorneys Charness made an alternative offer to settle the Charness action against Gallegos only, with a waiver of costs and fees on both sides. However, this proposed settlement would not resolve Gallegos's then-pending appeal of the attorneys fees awarded against her in connection with the insured's action. The Attorneys Charness suggest that the Attorneys Rand were unwilling to permit Gallegos to settle – and did not even *transmit*

their offers to Gallegos – because the Attorneys Rand would not agree to any settlement that did not involve an admission by the Attorneys Charness that their allegations of misconduct against the Attorneys Rand were "misfounded."[6]

On May 13, 2005, we filed our opinion in the first appeal. Concluding that Gallegos established a prima facie case that the subrogation action had been maliciously prosecuted against her, we concluded that the anti-SLAPP motion of the Attorneys Charness would not have been granted (had the case not been dismissed before the hearing on the anti-SLAPP motion). We therefore reversed the award of attorney's fees in favor of the Attorneys Charness.

On May 20, 2005, the Attorneys Charness submitted two new settlement offers to Gallegos and the Attorneys Rand. First, they again offered a global settlement. The second, alternative offer, was an offer to dismiss Gallegos from the Charness action in exchange for waivers of costs and fees. The offer presumably would allow the Attorneys Charness to seek review by the California Supreme Court of our resolution of the first appeal. The case did not settle.

On February 2, 2006, we issued our opinion in the second appeal. We concluded that the trial court had erred in determining the anti-SLAPP motion in the Charness action was procedurally barred. However, we affirmed the order denying the anti-SLAPP motion, on the basis that the Attorneys Charness had established

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[6] Such a request appears to be unethical. (Bus. & Prof. Code, § 6090.5)

a prima facie case that some of the causes of action in the insured's action had been maliciously prosecuted.

Because our opinions in both appeals have been somewhat misinterpreted by the parties, a brief clarification is in order. In the first appeal, we concluded that Gallegos had established a prima facie case that the subrogation action had been pursued with malice based on declarations – which had been disputed – indicating that the Attorneys Charness *knew* that they were bringing a subrogation action against their client's insured, but brought the action in order to force Gallegos's primary insurer to settle the claim. As the insured's action had been dismissed, there was never a *determination* that the subrogation action had been brought with malice. We concluded only that Gallegos's evidence, if believed, supported that conclusion. Similarly, in the second appeal, we concluded that the Attorneys Charness had established a prima facie case that certain causes of action in the insured's action had been pursued with malice, based on disputed evidence. No determination was made that the insured's action had been pursued with malice. We simply concluded that the evidence of the Attorneys Charness, if believed, supported the conclusion.

In the second appeal, we specifically considered whether the Attorneys Charness established a prima facie case of malicious prosecution *against Gallegos herself*. In this context, we considered the Gallegos declaration, and Attorney Leigh Charness's declaration in opposition. Taking Attorney Leigh Charness's declaration to be true, as was necessary given the procedural posture of the case (i.e., determining whether the Attorneys Charness presented evidence of a prima facie case), we concluded that

Gallegos's declaration that Attorney Leigh Charness had made her cry at the mediation would then be *false*. We noted that Gallegos had initially disclaimed the declaration at her deposition; and concluded that if she had not, in fact, signed the Gallegos declaration, that would be evidence that Gallegos had no part in submitting the presumably false declaration. However, since Gallegos then changed her deposition to indicate that she had authorized her attorneys to sign the declaration on her behalf, *this* testimony was evidence that Gallegos had been involved in submitting the presumably false declaration to the court.[7]

On May 15, 2006, having prevailed on the second appeal, the Attorneys Charness sought their attorney's fees as prevailing parties on the anti-SLAPP motion. Arguing that the anti-SLAPP motion had been frivolous, and requesting the application of a multiplier to the actual fees incurred, the Attorneys Charness sought an award of $131,825 in fees. On August 3, 2006, the trial court denied the request for fees. The

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[7] The Attorneys Charness subsequently discussed our opinion on this issue as follows: "Rand-Lewis forged her own client Gloria Gallegos's signature on a Declaration in opposition to Charness's anti-SLAPP Motion to Strike [citation], and thereafter convinced Gallegos to change her deposition testimony to assert that she was aware that Rand-Lewis had signed her name to the declaration. However, the Court of Appeal would later opine that such agreement by Gallegos to 'change' her deposition testimony is evidence of her participation in the wrongdoing of her lawyers [citation]." This characterization of our opinion is, at best, wishful thinking on the part of the Attorneys Charness. We did not opine that Gallegos "agree[d] . . . to 'change' her deposition testimony," and certainly did not opine that any such agreement was evidence of wrongdoing. We simply noted that, taking Gallegos's revised deposition testimony as an admission that she had participated in the submission of the Gallegos declaration to the court, the admission would constitute evidence of malice on her part, *assuming* the truth of Attorney Leigh Charness's assertion that the Gallegos declaration was false.

Attorneys Charness filed a notice of appeal from that order ("the third appeal"). On December 28, 2006, we dismissed the appeal as having been taken from an interlocutory order which was not immediately appealable.

On February 16, 2007, the State Bar filed charges against the Attorneys Rand, based on the complaint of the Attorneys Charness. The State Bar alleged, among other things: (1) that the Attorneys Rand had continued to prosecute the insured's action against the Attorneys Charness after the partial settlement without Gallegos's consent or knowledge; and (2) that the Attorneys Rand forged Gallegos's signature on the Gallegos declaration, without Gallegos's knowledge or authorization. The record does not indicate the resolution of the State Bar charges, although Attorney Rand-Lewis indicated in a declaration that the disciplinary proceedings had been "abated," perhaps because the Charness action was still pending.

On May 15, 2007, the Attorneys Charness filed their motion to disqualify the Attorneys Rand from representing Gallegos. The motion argued that the Attorneys Rand should not be permitted to continue the representation because: (1) disciplinary charges were pending against them for their representation of Gallegos; (2) there is a conflict of interest between Gallegos and the Attorneys Rand; and (3) the Attorneys Rand would be called upon to testify at the trial of the action. The Attorneys Charness supported their motion with declarations, deposition excerpts, and our appellate

opinions, all of which were purported to establish the following facts:[8] (1) Gallegos did not want the Attorneys Rand to file the insured's action; (2) Gallegos did not believe the allegations in the insured's action; (3) the Attorneys Rand never submitted the Attorneys Charness' settlement offers to Gallegos; (4) the Attorneys Rand demanded, as a settlement term, that the Attorneys Charness disavow their allegations of attorney misconduct against the Attorneys Rand; and (5) the Attorneys Rand "secreted" Gallegos from court ordered mediations so that Gallegos could not participate in them. The Attorneys Charness argued that "Gallegos does in fact have a conflict with [the Attorneys Rand] and would unlikely sustain her level of confidence if she knew that both of her attorneys were presently facing Disciplinary Charges before the State Bar Court for their conduct arising from this case, including forging her signature, . . . withholding a settlement offer for a period of years, . . . , etc."

Attorney Rand-Lewis filed a declaration in opposition. She stated that: (1) she has "kept Ms. Gallegos apprized of all relevant matters in this, and all underlying lawsuits, including but not limited to purported settlement offers and potential conflicts of interest;" and (2) the disciplinary action has been abated.

A hearing was held on June 8, 2007. At the hearing, counsel for the Attorneys Charness stated, "Gloria Gallegos has no idea that [our settlement] offer was ever made

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[8] The allegations (and the State Bar complaint) also include charges that the Attorneys Rand forged their secretary's signature on a proof of service. As the record contains no declaration of the secretary indicating her signature was forged, and only mere allegations that it has been, we do not further consider the issue.

to her because [Attorney Rand-Lewis] won't tell her because if Gloria Gallegos gets out of this case, it only leaves her and her father. So she won't let Gallegos out of this case for a waiver of costs that we offered four different times in writing." Counsel went on to say, of Attorney Rand-Lewis, "I'm thinking there's nothing that I can do except come to this court because I cannot work with her because she's a party and she's been a dishonest party, and the State Bar does have charges against her because she has repeatedly forged signatures of her client, her secretary. She impugned [another judge] and got him thrown out of a case because she lied. I'm over her." Given the level of personal animosity in the courtroom, the trial court took the matter under submission.

On June 12, 2007, the court issued an order continuing the motion. The court granted the continuance in order for the Attorneys Rand to obtain from Gallegos a declaration "which states: 'I, Gloria Gallegos, have been fully advised of possible potential conflicts which may arise from my continued representation by co-defendants [Attorneys Rand] in [the Charness action] and [I] hereby acknowledge and waive any objection I might have to my continued representation by [the Attorneys Rand]. I further admit that I have been advised by my attorney Rand-Lewis that plaintiff has made several offers to settle this matter with myself, defendant Gallegos, in exchange for a waiver of costs and that I have knowingly refused to accept such settlement offers.' " In addition, the court ordered Gallegos to appear at the continued hearing.

Gallegos submitted a declaration in order to comply with the court's order, although the declaration was not in the precise terms set forth by the court. Gallegos declared that the Attorneys Rand are her counsel of choice, that she would be prejudiced

by their disqualification at this late stage of the proceedings, and that she cannot afford to hire new counsel. She stated, "From the beginning of this lawsuit I have been advised of possible conflicts which may arise from my continued representation by [the Attorneys Rand]. I have always been aware that they are also Defendants in this suit. I am aware that if this case proceeds to Trial it is possible that they might also testify as witnesses on their and my behalf while they are also my Trial counsel. I have been advised of all offers to settle, the rejection of the offers and have approved of the counter-offers made by me." She further stated, "I have also been advised of the State Bar Complaints filed by [Attorney] Leigh Charness."

Gallegos appeared at the continued hearing on July 9, 2007, where she informed the court that she had read and understood her declaration. Counsel for the Attorneys Charness argued that he had previously made several settlement offers to Gallegos to dismiss her in exchange for a waiver of costs, and his belief that the offer had not been transmitted to Gallegos. He also argued, "the argument that Miss Gallegos would incur substantial attorney's fees if there was a disqualification is a disingenuous one because Miss Gallegos has an absolute defense in a case like this. She can just assert advice of counsel and she'll be out. [¶] But that was never raised on her behalf. So there's two ways she could have been out: If her present counsel would have asserted that particular defense, or if she would have looked at the multiple offers that we had made, which was literally a dismissal for a waiver of fees and costs." He then added, however, "The problem is, is that what [Attorney] Rand-Lewis did was forced us to go to the Court of Appeal and incur substantial attorney's fees. She did that without her client

knowing, and then incurred the attorney's fees on both sides. [¶] So the present offer now is not what the offer was when it was made." Attorney Rand-Lewis responded that every offer has, in fact, been discussed with Gallegos.

At this point, the court asked Gallegos if she wanted to stay in the case, or if she would accept the apparent offer of a dismissal for a waiver of costs and fees on both sides. Attorney Rand-Lewis objected because Gallegos would, in fact, be willing to accept those terms, but the Attorneys Charness were not, in fact, making that offer. Counsel for the Attorneys Charness agreed. He represented that the offer to dismiss in exchange for a waiver of costs and fees had been made "long ago," and that Attorney Rand-Lewis had declined to transmit the offer to Gallegos. The court asked counsel for the Attorneys Charness, "So I take it there is no offer to dismiss today?" Counsel agreed, stating, "That offer was withdrawn when they forced us to go to the Court of Appeal, your honor."[9] The trial court denied the motion to disqualify counsel. The Attorneys Charness filed a timely notice of appeal.

ISSUES ON APPEAL

On appeal, the Attorneys Charness argue that the disqualification motion was erroneously denied. In addition, they argue that the trial court erred in denying them attorney's fees in connection with the anti-SLAPP motion – the same order challenged by the Attorneys Charness in the third appeal, which we dismissed as taken from

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[9] This statement is somewhat mistaken. According to the writings reflecting the offers, the offers were made as late as May 20, 2005, after our opinion in the first appeal, and while the second appeal was pending.

a nonappealable order. We conclude that this order cannot be considered in the context of the appeal by the Attorneys Charness from the denial of their disqualification motion. We next conclude that the Attorneys Charness are not entitled to prevail on the disqualification motion. We therefore affirm.

DISCUSSION

1. *The Nonappealable Attorney's Fees Order*

The Attorneys Charness previously attempted to appeal the order denying them attorney's fees in connection with their defeat of the anti-SLAPP motion in the Charness action. In the third appeal, we concluded that the order was an interlocutory order not immediately appealable. Now, the Attorneys Charness attempt to obtain appellate review of that order as a matter reviewable in the course of their appeal from the denial of the motion for disqualification.

Code of Civil Procedure section 906 provides, in pertinent part, that on an appeal of an appealable judgment or order "the reviewing court may review . . . any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." It is clear that where the propriety of an otherwise nonappealable order affects the validity of the order appealed from, the former may be reviewed on appeal from the latter. (*Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 736.)

It cannot be disputed that the denial of attorney's fees bears no relation to the denial of the motion to disqualify counsel. Thus, in order for the order denying

attorney's fees to be reviewable on this appeal, it must substantially affect the rights of a party. The Attorneys Charness make no argument that the denial of attorney's fees substantially affects their rights, and we see no reason why such an order could not be reviewed on an appeal from a final judgment. Allowing review of any unrelated nonappealable order on appeal of any subsequent intermediate appealable order would undermine the one final judgment rule. (*Fontani v. Wells Fargo Investments, LLC*, *supra*, 129 Cal.App.4th at p. 736.) We therefore do not consider the order denying the Attorneys Charness their attorney's fees.

2. *Motion to Disqualify Counsel*

"Generally, before the disqualification of an attorney is proper, the complaining party must have or have had an attorney-client relationship with that attorney." (*Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 352.) In the absence of an attorney-client relationship, the complaining party may succeed on a disqualification motion if there is a breach of a duty of confidentiality owed to the complaining party, even in the absence of an attorney-client relationship. (*Id*. at pp. 352-353.) This is often referred to as a "standing" requirement, but since "standing" is a matter of the right to bring an action, not a motion, it is better characterized as a matter of whether the movant is entitled to prevail on the motion to disqualify. (*Id*. at p. 353, fn. 2.)

The Attorneys Charness concede that they have never had an attorney-client, fiduciary, or confidential relationship with the Attorneys Rand. They argue, however, based on non-California authority, that they should nonetheless be permitted to disqualify the Attorneys Rand from representing Gallegos in the interest of preserving

the integrity of the judicial system, and guaranteeing that any judgment they might obtain against Gallegos would not be subject to challenge on the basis that her counsel should have been disqualified. While there may be a case in which it is appropriate to permit an opposing party to prevail on a motion to disqualify opposing counsel under such circumstances, this is not that case.

"The appellate court will not disturb the trial court's decision to grant or deny a disqualification motion absent an abuse of discretion. [Citations.] Nor will the appellate court substitute its factual findings for the trial court's express or implied findings so long as they are supported by substantial evidence. [Citation.]" (*Dino v. Pelayo*, *supra*, 145 Cal.App.4th at p. 351.) "In reviewing [an order on a motion to disqualify], we acknowledge the issue of disqualification impacts significant, sometimes conflicting, policy concerns. These concerns include a party's right to choose its own counsel, a client's right to confidentiality and trust, and the public's interest in 'the scrupulous administration of justice and the integrity of the bar.' [Citation.] [¶] 'On the one hand, a court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court. [Citations.] On the other hand, it must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement. . . . [¶] Additionally, as courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that

they purport to prevent. [Citation.] Such motions can be misused to harass opposing counsel [citation], to delay the litigation [citation], or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable. [Citations.] In short, it is widely understood by judges that "attorneys now commonly use disqualification motions for purely strategic purposes." [Citations.]' [Citation.]" (*Id*. at pp. 351-352.)

In this case, the trial court had before it substantial evidence to support its implied findings that the Attorneys Rand kept Gallegos properly informed and that she had waived any conflicts. The declarations of Gallegos and Attorney Rand-Lewis themselves support this conclusion.[10] The Attorneys Charness argued that these declarations were untrue. But the trial court was well within its discretion to disagree with the Attorneys Charness's characterization of the evidence. We consider two examples. First, the Attorneys Charness assert that Attorney Rand-Lewis forged Gallegos's signature on the (earlier) Gallegos declaration, and then convinced Gallegos to change her deposition testimony to indicate that she had authorized Attorney Rand-Lewis to sign it for her. Yet the evidence is just as easily interpreted as indicating that Gallegos *did* authorize Attorney Rand-Lewis to sign the Gallegos declaration for

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10 While the Attorneys Charness suggest the declarations are not sufficient written waivers of the conflicts as required by the Rules of Professional Conduct, we note that this was not a disciplinary proceeding against the Attorneys Rand. The Attorneys Charness have presented no authority requiring a trial court to verify that opposing counsel has complied in all respects with the Rules of Professional Conduct based solely on their accusation of impropriety.

her, and simply misspoke or misremembered at her deposition. Second, the Attorneys Charness assert that Attorney Rand-Lewis never conveyed their settlement offers to Gallegos, apparently on the theory that no client to whom the offer had been conveyed possibly could have rejected it. But the evidence indicates that the only offers made to Gallegos alone, rather than global settlement offers, pertained solely to the Charness action, and did not include a resolution of the then-pending first appeal in the Gallegos action.[11] While we do not speculate as to Gallegos's reasons for rejecting the settlement offers, it appears clear to us that a rational individual in Gallegos's position could have held out for a settlement that completely removed her from all litigation involving the Attorneys Charness.

Finally, we are aware of the competing policy interests. We recognize that the Attorneys Charness: (1) were aware that the Attorneys Rand had represented themselves as well as Gallegos in the Charness action from approximately mid-2003; (2) were aware of Gallegos's deposition testimony, purportedly calling into question her participation in the insured's action, from August 2004; and (3) were aware of Attorney Rand-Lewis's allegedly unethical and improper settlement demands from May 2005; but (4) did not pursue their motion to disqualify until May 2007. Having waited this long to bring their motion to disqualify, we question whether it was simply a strategic motion, rather than a motion brought out of concern for the interests of justice.

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[11] One settlement offer post-dated our resolution of the first appeal in Gallegos's favor. It did not, however, include a waiver of the Attorneys Charness's right to petition the Supreme Court for review of our decision.

We further note that the motion of the Attorneys Charness is based on their belief that, although there is evidence in the record to the contrary, Gallegos was *not* involved in the prosecution of the insured's action against them. Indeed, while the language in their appellate briefs is rather more conditional, their counsel represented to the trial court that "Gallegos has an absolute defense in a case like this." Counsel for the Attorneys Charness also represented to the trial court that the Attorneys Charness were no longer willing to dismiss Gallegos in return for a waiver of costs and fees because "[Attorney] Rand-Lewis . . . forced us to go to the Court of Appeal and incur substantial attorney's fees. She did that without her client knowing, and then incurred the attorney's fees on both sides." Although we hesitate to mention it for fear it might spawn yet another malicious prosecution action, we are forced to question the good faith of the Attorneys Charness in continuing to prosecute a malicious prosecution action against a party whom they believe was not at all involved in bringing the case against them. If the Attorneys Charness are correct in their assertions regarding Gallegos's lack of knowledge, the proper remedy is for them to dismiss their action against her, not seek to disqualify her counsel.

CONCLUSION

We feel obligated to reiterate the following. Neither the Attorneys Charness nor the Attorneys Rand are blameless here. The Attorneys Charness set these years of litigation in motion by filing a baseless subrogation action against their client's insured. The Attorneys Rand appear to have substantially overreached in bringing the insured's

action against the Attorneys Charness for anything other than malicious prosecution.[12] This case arose from a $3,300 insurance claim eight and a half years ago, and has involved (at latest count) three lawsuits, four appeals, a State Bar complaint, and hundreds of thousands of dollars in attorney's fees. While each side asserts that it is the other which has been unreasonable, it appears to this court that both parties are responsible for allowing this dispute to expand far beyond control. We again implore the parties to resolve their dispute and bring to an end this wasteful expenditure of each attorney's time and treasure as well as very scarce judicial resources.

[12] We reiterate, however, that it has never been determined that either set of attorneys acted with malice in bringing these actions.

DISPOSITION

The order denying disqualification is affirmed. Gallegos and the Attorneys Rand shall recover their costs on appeal. As the attorneys' conduct in this case has already been brought to the attention of the California State Bar, the Clerk of this court is directed to forward a copy of this opinion to that entity for whatever action it deems appropriate.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.